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Nos. 92-1134 and 92-1448

In the Supreme Court of the United States

OCTOBER TERM, 1992

JON EDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

BERNHARD F. MANKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an *ex parte* contact between a district judge and a prosecutor that does not result in prejudice to a defendant requires reversal of a criminal conviction.

2. Whether the district court properly instructed the jury on the element of willfulness.

3. Whether the jury's response to a special interrogatory rendered irrelevant any error in the district court's instructions regarding the deductibility of interest.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25)[1] is reported at 979 F.2d 900.

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[1] Except as otherwise indicated, all references herein to "Pet. App." are to the appendix to the petition for certiorari in No. 92-1448.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1992. Petitions for rehearing were denied on December 4, 1992. Pet. App. B1; 92-1434 Pet. App. 25a. The petition for a writ of certiorari in No. 92-1434 was filed on March 3, 1993. The petition for a writ of certiorari in No. 92-1448 was filed on March 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner Edelman was convicted on eight counts of knowingly and willfully making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1); 16 counts of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2); and one count of conspiring to defraud the United States by generating false and fraudulent tax deductions, in violation of 18 U.S.C. 371. Petitioner Manko was convicted on two counts of knowingly and willfully making and subscribing false tax returns; 21 counts of aiding and assisting in the preparation of false returns; and one count of conspiracy to defraud the United States by generating false and fraudulent tax deductions. Petitioners were each sentenced to five years' imprisonment and a $450,000 fine. The court of appeals affirmed.

1. a. Petitioners developed a tax shelter that purportedly used repurchase transactions (repos) in United States Treasury Bills (T-Bills) to generate interest deductions in the first tax year and corresponding gains in the subsequent year, with little or

no risk. Petitioners raised over $25 million from investors and promised to generate four times that amount in deductions. Because the interest deduction created in the first year of a repo transaction was relatively small compared to the face value of the T-Bill involved in the transaction, petitioners had to engage in huge quantities of repos in order to generate the promised deductions. Accordingly, they created documents reflecting that a dormant shell company and two clearing brokers controlled by them had conducted the necessary repo transactions. The deductions supposedly created were then passed through various investment partnerships to unwitting investors. Pet. App. A3-A7.

The evidence at trial established that petitioners did not engage in any actual trading and that the purported repo transactions were in fact shams. Pet. App. A6-A9. After the jury had returned its verdict, the district court gave the jury a supplemental interrogatory asking whether the jury had concluded that the transactions never took place or that they lacked economic substance.[2] The jury responded that it had found that the transactions never occurred. *Id.* at A9-A10.

b. During a break toward the end of the government's closing argument, and in the absence of defense counsel, one of the prosecutors initiated a conference with the district judge. The conference was transcribed, and the transcript was sealed until after the government's rebuttal. During the *ex parte* conference the prosecutor advised the judge that he in-

[2] The government had argued that the transactions had never taken place and, in the alternative, that if the transactions had occurred they were devoid of risk and, therefore, lacking in economic substance. Pet. App. A9.

tended to utilize a chart during his rebuttal that consisted of a list of witnesses' names together with quotations or paraphrases of their trial testimony. The prosecutor explained that he was informing the court *ex parte* because, while he did not want to reveal his plans for rebuttal until defense counsel had given their closing arguments, he did want the court to be aware of his intention to use the chart so that the court could set aside sufficient time for a hearing in the event of defense objections to the use of the chart. Pet. App. A17-A18.

The prosecutor also stated that he would disclose the chart to defense counsel prior to their closing arguments if the court believed that was necessary. The district judge responded that she did not think the chart had to be disclosed at that time. The judge also stated that she would check the accuracy of the entries on the chart in order to be in a position to rule on any defense objections. Pet. App. A18.

After petitioners had completed their closing arguments, the government informed them that it intended to use the chart on rebuttal. The district court gave petitioners 45 minutes to review the accuracy of the chart, which consisted of 28 quotations or paraphrases. Although petitioners objected to the use of the chart and requested surrebuttal, they did not identify any specific inaccuracies in the chart that would justify preventing its use. The district court overruled the objection and denied the request for surrebuttal. Pet. App. A18.

2. The court of appeals affirmed. Pet. App. A1-A25. The court first found that no extraordinary circumstances justified the *ex parte* conference and that it was therefore improper. *Id.* at A19. The court held, however, that reversal would be required

only if the *ex parte* contact affected the fairness of the trial. *Ibid.*

Two facts convinced the court of appeals that reversal was not required in this case. Pet. App. A20. First, the court found that "because the chart was clearly accurate and within the scope of rebuttal, there is no reason to believe that the district court would have ruled differently absent the *ex parte* conference." *Ibid.* Second, the court of appeals expressed doubt that, in the context of a four-month trial, the chart played even a minimal role in influencing the jury's verdict. The court pointed out that the prosecution had presented substantial evidence that the purported repo transactions never occurred, and it found that the chart "did not present any new information or any information that could not have been conveyed easily to the jury without the chart." *Ibid.* Thus, the court held that the "highly improper *ex parte* conference" did not constitute reversible error. *Ibid.*

The court of appeals also rejected petitioners' contention that they were unfairly prejudiced when, during the course of the trial, the district court allegedly reversed its position concerning the proper definition of "economic substance." Pet. App. A22. The court of appeals first suggested that no such reversal occurred, because "[t]he [district] judge did not provide the parties with a precise definition of economic substance until her instructions to the jury." *Id.* at A23. Prior to trial, the judge had stated only that the parties should present evidence on " 'whatever factors you believe are relevant' " to the question of economic substance. *Ibid.*

The court of appeals concluded, however, that it was unnecessary to resolve the question whether the district court had reversed itself on this issue. In response to the special interrogatory, the jury found that the transactions " 'were fictitious and did not take place.' " Pet. App. A23. That finding, in the court's view, "rendered the jury's understanding of the term 'economic substance' irrelevant to the outcome." *Ibid.*

Petitioners also claimed that the district court improperly instructed the jury on the element of willfulness. Pet. C.A. Br. 91-93. The court of appeals rejected that contention without discussion. Pet. App. A20-A21.

ARGUMENT

1. Petitioners contend (92-1434 Pet. 7-23; 92-1448 Pet. 11-15) that the court of appeals erred in holding that the *ex parte* conference in this case did not constitute reversible error. The court of appeals correctly determined, however, that any error was harmless.

a. It is settled law that *ex parte* communications between the prosecutor and the trial judge do not constitute reversible error unless they result in prejudice to the accused. *United States* v. *Walsh*, 700 F.2d 846, 858 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *Brown* v. *Dixon*, 891 F.2d 490, 495-496 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990); *United States* v. *Earley*, 746 F.2d 412, 417 (8th Cir. 1984); *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); *United States* v. *Adams*, 785 F.2d 917, 921

(11th Cir.), cert. denied, 479 U.S. 858 (1986).[3] That rule is in accord with decisions of this Court establishing that harmless-error analysis is the norm, not the exception, when a criminal defendant's constitutional rights have been violated. See *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263 (1991); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-257 (1988); *Rushen* v. *Spain*, 464 U.S. 114, 118 n.2 (1983) (per curiam); *Chapman* v. *California*, 386 U.S. 18, 22 (1967).

The court of appeals in this case properly applied the rule that *ex parte* contacts are subject to harmless-error analysis. Observing that the chart was clearly accurate and within the scope of rebuttal, the court found "no reason to believe that the district court would have ruled differently absent the *ex parte* conference." Pet. App. A20.[4] In addition, the

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[3] See also *Rushen* v. *Spain*, 464 U.S. 114, 117-121 (1983) (per curiam) (*ex parte* contact between judge and juror harmless error); *LaChappelle* v. *Moran*, 699 F.2d 560, 566-567 (1st Cir. 1983) (*ex parte* contact between trial judge and witness not *per se* unconstitutional).

[4] Petitioner Manko contends (92-1448 Pet. 13-14) that the district court "could have" ruled more favorably to the defense in one of several ways. The relevant point, however, is that the district court would not have ruled differently absent the *ex parte* hearing, and thus it is impossible to identify any prejudice suffered by petitioners as a result of that hearing. The prosecutor was under no obligation to give the defense a preview of his rebuttal, cf. *United States* v. *Windham*, 489 F.2d 1389, 1392 (5th Cir. 1974) (government did not have to disclose rebuttal witnesses to defense), and he simply could have waited until the defendants completed their summations before asking to use the chart. Manko offers no reason to believe that the district judge would have ruled differently if she had first become aware of the chart in that manner.

court doubted that the chart played even a minimal role in influencing the jury verdict, given the length of the trial, the substantial evidence presented by the prosecution to show that the purported repo transactions never occurred, and the fact that the chart did not present any new information or any information that could not have been easily conveyed to the jury without the chart. Thus, the court held that the *ex parte* conference did not constitute reversible error. *Ibid.* That fact-bound determination is not worthy of further review.

b. Petitioner Edelman erroneously contends (92-1434 Pet. 8-14) that the court of appeals did not have a sufficient record before it to determine whether the *ex parte* contact in question was in fact harmless. The court of appeals had before it a transcript of the challenged *ex parte* conference. 92-1434 Pet. App. 29a-30a. That transcript enabled the court to ascertain whether the contact was prejudicial.

Edelman asserts (92-1434 Pet. 9), however, that the transcript is incomplete on its face. He also contends (*id.* at 8-9) that the chart that was shown to the judge was not before the court of appeals. But Edelman failed to raise those issues in either his opening brief or his reply brief on appeal, and the court of appeals did not address them.[5] Thus, those issues should not now be considered. See *United States* v. *Williams*, 112 S. Ct. 1735, 1738-1739 (1992).

In any event, the record before the court of appeals was sufficient to permit consideration and rejection of petitioners' claims. Contrary to Edelman's con-

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[5] Edelman first challenged the adequacy of the record before the court of appeals in his petition for rehearing.

tention, the transcript is not incomplete on its face. The transcript (92-1434 Pet. App. 29a-30a) begins with the trial judge's asking the prosecutor, "What is it you have handed me." *Id.* at 29a. The prosecutor then explains that the document is a copy of a chart that he intends to utilize during his rebuttal. *Id.* at 29a-30a. The transcript concludes as follows (*id.* at 30a):

> Mr. Cleary [the prosecutor]: Thank you, Judge.
>
> The Court: All right.

Thus, the transcript is complete on its face.

Although the chart shown to the judge was not itself part of the record on appeal, the substance of the chart was before the court of appeals. During the *ex parte* conference, the prosecutor described the chart as "list[ing] witness' names and either quotations or paraphrases of their testimony." 92-1434 Pet. App. 29a. Similarly, in open court one of the defendants' lawyers described the chart given him by the prosecutor prior to rebuttal as "containing 28 quotations from the record." *Id.* at 34a. Finally, during his rebuttal argument (see, *e.g.*, Tr. 6945-6946, 6956-6959, 6985-6987, 7018-7022), the prosecutor expressly referred to the chart and discussed quotations or paraphrases that the court of appeals could reasonably infer appeared on the chart; that argument was transcribed and was before the court of appeals as part of the trial transcript.[6] Thus,

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[6] During the prosecutor's rebuttal, defense counsel objected to entries on the chart that they believed to be inaccurate. On the two occasions when minor inaccuracies were found, the prosecutor corrected the chart. Tr. 6946, 6985. Neither on

there is no reason to believe that the court of appeals was not sufficiently aware of the contents of the chart.

In short, the court of appeals had both a complete transcript of the *ex parte* conference and the transcript of the rebuttal argument before it when it considered petitioners' claims. This case is therefore not in conflict with *Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989), upon which Edelman relies (92-1434 Pet. 9-10). In *Guenther*, a tax fraud case, a memorandum that "allegedly impugned the character of the taxpayers" was presented to the trial judge *ex parte* by the government. 889 F.2d at 884. The memorandum was not in the record, and the court of appeals therefore concluded that it "d[id] not have sufficient knowledge to enable [it] to determine whether taxpayers might have been prejudiced." *Ibid.* Accordingly, the court remanded for an evidentiary hearing. *Id.* at 885. In this case, by contrast, the record provided the court of appeals with sufficient information to determine that no prejudice resulted from the *ex parte* conference, and thus a remand was not required.

Edelman also errs in contending (92-1434 Pet. 10-11) that the decision below conflicts with *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986), and *Grieco* v. *Meachum*, 533 F.2d 713, 719 (1st Cir.), cert. denied, 429 U.S. 858 (1976). In *Paradyne Corp.*, the court required the district judge to release to the defendants the transcript of an *ex parte* communication between the judge and the prosecution concerning the government's attempt to disqualify defense counsel. 803 F.2d at 612. In this case, by

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appeal nor in this Court have petitioners established that any other entries on the chart were inaccurate.

contrast, the transcript of the *ex parte* conference was unsealed by the district court after trial, and both petitioners and the court of appeals had access to it. *Paradyne Corp.* certainly does not suggest that the failure to provide petitioners with a copy of the transcript immediately after completion of the *ex parte* hearing requires reversal despite the absence of any prejudice to petitioners.

In *Grieco* v. *Meachum*, the court refused to overturn the convictions of several defendants despite the fact that, at trial, the prosecutor provided the trial court, but not defense counsel, with trial memoranda. 533 F.2d at 719. The court of appeals held that "the practice of submitting *ex parte* trial memoranda, although meriting censure, is not a per se violation of [the defendants'] due process rights," and declined to set aside the convictions in light of the defendants' inability to identify any specific prejudice they might have suffered from the *ex parte* trial memoranda. *Ibid.*

The *Grieco* court reached its determination without benefit of the trial memoranda in question. The court noted that "[t]he trial briefs were not available in the district court. A search of the Massachusetts court records did not reveal them, and the prosecutor could only find one partial sample memorandum in his personal files. The prosecutor, however, testified that the sample corresponded to his memory of the trial briefs." 533 F.2d at 719 n.5. Thus, *Grieco* is directly inconsistent with Edelman's assertion that the court of appeals erred in relying on the record before it to reject petitioners' claims.[7]

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[7] The decision below is also consistent with *State* v. *McGuinn*, 232 S.E.2d 229 (S.C. 1977), on which Edelman relies (92-1434 Pet. 11). In that case, the court remanded

c. Edelman claims (92-1434 Pet. 12-13) that the court of appeals' decision conflicts with the decisions of other courts of appeals that require the government to establish that an *ex parte* contact constituted harmless error. See *id.* at 12 (citing *Haller* v. *Robbins*, 409 F.2d 857, 860 (1st Cir. 1969); *United States* v. *Hackett*, 638 F.2d at 1188; *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992)). Edelman's claim is without merit.

The court of appeals in this case did not explicitly address the question of which party bore the burden of proof on the harmless-error issue. In any event, the government satisfied whatever burden it may have had to show lack of prejudice. In the first place, the government established that the use of the chart in rebuttal was proper and that the district court would have permitted that use of the chart even if no *ex parte* contact had occurred. Pet. App. A19-A20. In addition, as the court of appeals found, it was doubtful that the chart played even a minimal role in influencing the jury verdict. *Id.* at A20. Thus, the government demonstrated that the *ex parte* conference did not constitute reversible error.[8]

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for resentencing because there was no way to determine whether the *ex parte* conference, which had not been transcribed, was prejudicial. 232 S.E.2d at 231.

[8] Edelman asserts (92-1434 Pet. 11) that, in declining to reverse petitioners' convictions, the court of appeals improperly relied on the fact that the trial lasted four months. In pointing to the length of the trial, however, the court was merely demonstrating how unlikely it was that the use of a chart in closing argument could have influenced the jury in any significant way in its deliberations. The court did not suggest that the length of the trial would have prevented

In arguing that the court of appeals improperly placed the burden of proof on petitioners, Edelman apparently relies (92-1434 Pet. 13) on the court's observation (Pet. App. A19) that petitioners had not pointed to any inaccuracies in the prosecutor's chart and had not identified any way in which the chart went beyond proper rebuttal. That comment does not indicate, however, that the court required petitioners to establish prejudice. The court's comment related solely to the propriety of allowing the government to use the chart in rebuttal. Immediately after addressing that issue, the court pointed out that "[o]f course, the propriety of using the chart cannot be the measure of whether the *ex parte* proceeding constituted reversible error" (*Id.* at A20), and went on to find from the facts before it that petitioners did not suffer any prejudice from the *ex parte* conference. *Ibid.*[9]

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a reversal if petitioners had suffered prejudice from the *ex parte* contact.

[9] Moreover, the cases on which Edelman relies do not preclude courts from considering whether the defendant has been able to identify any prejudice resulting from the improper *ex parte* contact. In *United States* v. *Hackett*, for example, the court expressly observed that the defendant had not identified any specific prejudice resulting from the *ex parte* contact. 638 F.2d at 1188. Similarly, in *Grieco* v. *Meachum*, the First Circuit (the same court that previously decided *Haller* v. *Robbins*), relied in part on the fact that the defendants had not been able to point to any specific prejudice caused by the *ex parte* contact. 533 F.2d at 719. Finally, in *United States* v. *Minsky*, there was no reason for the court to consider whether the defense had identified any prejudice, because the potential for prejudice was obvious: as a result of the *ex parte* conference, the defense had been improperly denied access to a statement that would have allowed the defense to undermine the credibility of a key government witness. 963 F.2d at 874.

d. Edelman erroneously contends (92-1434 Pet. 13-14) that the court of appeals' opinion is inconsistent with *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam). In that case, this Court "emphatically disagreed[d]" with the proposition that unrecorded *ex parte* contacts between a trial judge and a juror can never be harmless error. 464 U.S. at 117. The Court held instead that the prejudicial effects of a judge's failure to disclose such contacts can ordinarily be determined by a post-trial hearing. *Id.* at 119.

Edelman observes (92-1434 Pet. 14) that there was no post-trial hearing in this case. On this record, however, no hearing was necessary. Here, unlike in *Rushen* v. *Spain*, a transcript of the *ex parte* conference was available, and the record provided the court of appeals with a sufficient means of determining the contents of the chart given the judge.[10]

e. Petitioners contend (92-1434 Pet. 15-16; 92-1448 Pet. 14-15) that the decision of the court of appeals is irreconcilable with *United States* v. *Minsky*, 963 F.2d 870 (6th Cir. 1992). In *Minsky*, however, the *ex parte* conference was demonstrably prejudicial to the defendant. The conference took place at a time

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[10] Edelman also notes (92-1434 Pet. 14) that this case involves *ex parte* contact between a prosecutor and the judge, rather than, as in *Rushen* v. *Spain*, contact between the judge and "an unsophisticated and presumably neutral juror." It is unclear, however, what solace Edelman derives from that distinction. Obviously, the concern in *Rushen* v. *Spain* was that the judge might have had some improper influence on the juror, not that the juror might have influenced the judge. If anything, the risk of prejudice created by an *ex parte* contact with an "unsophisticated" juror is greater than that posed by a prosecutor's *ex parte* contact with a judge, who is trained in the law and is familiar with judicial proceedings, and who was not the factfinder in this case.

when the defense was arguing that FBI interview reports were subject to disclosure under the Jencks Act and *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the conference concerned that matter. 963 F.2d at 872-874. Immediately after the conference, the trial court declined to order disclosure of a statement that might have undermined the credibility of a key government witness. *Id.* at 873. The court of appeals pointed out that the government had "proffered no explanation why the defense was denied an opportunity to participate in a conference at such a critical stage of the proceedings." *Id.* at 874.

By contrast, the *ex parte* conference in this case did not occur at a critical stage of the proceedings and was not prejudicial. Unlike the defendant in *Minsky*, petitioners were not deprived of any information to which they were entitled that might have affected the outcome of the case.[11] Petitioners had a meaningful opportunity to challenge the use of the chart and its accuracy. Moreover, as the court of appeals found (Pet. App. A20), there is no likelihood that the district court's ruling on the use of the chart would have been different absent the conference, nor is there any likelihood that the use of the chart had any significant impact on the jury's verdict.

Minsky does not suggest that reversal is required under these circumstances. To the contrary, the *Minsky* court recognized that an *ex parte* communication between a judge and prosecutor may constitute harmless error. 963 F.2d at 874. Thus, the standards announced in *Minsky* are consistent with those ap-

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[11] Petitioners cite no authority entitling a defendant to advance information about the prosecutor's rebuttal summation.

plied in this case, and the fact-bound question whether the court of appeals properly found that petitioners suffered no prejudice does not warrant review by this Court.[12]

f. Petitioners next contend (92-1434 Pet. 19-20; 92-1448 Pet. 12) that reversal was automatically required because the *ex parte* conference was a critical stage of the trial. That contention is incorrect.

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[12] Petitioner Edelman errs in suggesting (92-1434 Pet. 16 & n.13) that the decision below conflicts with various decisions of state supreme courts. In *Rose* v. *State*, 601 So. 2d 1181 (Fla. 1992), for example, the court reversed and remanded after the trial court adopted the State's proposed order rejecting the defendant's motion for post-conviction relief in a death penalty case without holding an evidentiary hearing or even giving defense counsel notice of the receipt of the proposed order or an opportunity to respond. 601 So. 2d at 1182-1183. The court made clear, however, that while judges should not engage in *ex parte* contacts, "this would not include *strictly* administrative matters not dealing in any way with the merits of the case." *Id.* at 1183. In *Sanborn* v. *Commonwealth*, 754 S.W.2d 534 (Ky. 1988), the court characterized the trial judge's *ex parte* contact with the prosecutor (754 S.W.2d at 549) as an "erro[r] which would not qualify individually as reversible error." *Id.* at 542. In *State* v. *Crawford*, 577 P.2d 1135, 1143 (Idaho 1978), the *ex parte* contact was highly prejudicial: based on the prosecutor's *ex parte* motion, the trial court ordered the defendant physically restrained during trial, with the result that "[n]either the defendant nor his attorney had any opportunity before the prospective jurors saw him manacled and shackled to contest the order that the defendant be restrained." 577 P.2d at 1142. Finally, *State* v. *Barker*, 420 N.W.2d 695 (Neb. 1988), is inapposite, because the court based its holding on state law and expressly stated that "consideration of questions reaching constitutional dimensions is unnecessary for disposition of [this] appeal." 420 N.W.2d at 697; see *id.* at 698-699.

An *ex parte* contact is not necessarily a critical stage of a criminal proceeding such that the absence of the defendant and his counsel requires reversal without a showing of prejudice. In *Rushen* v. *Spain*, for example, this Court held that an *ex parte* contact between the judge and a juror did not warrant reversal in the absence of prejudice. 464 U.S. at 117-119. Similarly, the courts of appeals have repeatedly held that an *ex parte* but nonprejudicial contact between a trial judge and a prosecutor does not constitute reversible error. See, *e.g.*, *United States* v. *Walsh*, 700 F.2d at 858; *Brown* v. *Dixon*, 891 F.2d at 495-496; *United States* v. *Minsky*, 963 F.2d at 874; *United States* v. *Earley*, 746 F.2d at 417; *United States* v. *Hackett*, 638 F.2d at 1188; *United States* v. *Adams*, 785 F.2d at 921. Petitioners cite no authorities to the contrary.

In this case, the *ex parte* conference was not a critical stage of the trial. The conference was purely administrative in nature and had nothing to do with the merits or substance of the case. The prosecutor brought the chart to the district judge's attention simply in order to permit the judge to "allot whatever time is necessary between the end of the last defense summation and the beginning of the rebuttal summation should there be objection." Pet. App. A18. He did not attempt to make any argument to the judge in support of the use or accuracy of the chart. Although the judge indicated that she would check the accuracy of the quotations and paraphrases on the chart in order to be in a position to rule on any objections, she did not give any indication as to what her ruling might be or state that she would inform the prosecutor of the results of her review in

advance. *Ibid.* Thus, the meeting was not a critical stage of the trial.[13]

The critical stages occurred after the prosecutor had provided a copy of the chart to the defense and had indicated that he intended to use it during his rebuttal. At that point, petitioners were present and represented by counsel, and they had an opportunity to challenge the use of the chart before it occurred. Petitioners were also present and represented by counsel during the prosecutor's rebuttal, and could have objected at any time to any inaccurate or unduly prejudicial representations on the chart. Indeed, defense counsel did object on two occasions. Tr. 6946, 6985. In short, petitioners were not deprived of the effective assistance of counsel at any critical stage of the proceeding, and thus there is no basis for presuming prejudice. See *United States* v. *Cronic*, 466 U.S. 648, 659 & n.26 (1984); see also *Rushen* v. *Spain*, 464 U.S. at 118 n.2. The *ex parte* contact in this case simply did not constitute "a breakdown in the adversarial process that would justify a presump-

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[13] Petitioner Edelman attempts to characterize this conference as "secret assistance" (92-1434 Pet. 20-23) by the judge to the prosecutor and a discussion of "prosecution strategy." *Id.* at 17. In fact, however, the judge did not give any assistance to the prosecutor: she did not indicate that she would allow the use of the chart, and she offered no advice whatsoever as to how the prosecutor might use the chart during rebuttal, what he might argue in response to an objection to the chart, or what he might argue in rebuttal. While the judge told the prosecutor that he need not disclose the chart to defense counsel before they had completed their summations, that statement did not rise to the level of improper assistance or discussion of strategy, because there is no basis for suggesting that the defense was entitled to a preview of the prosecutor's rebuttal in any event.

tion that [petitioners'] conviction was insufficiently reliable to satisfy the Constitution." *Cronic*, 466 U.S. at 662; see also *Arizona* v. *Fulminante*, 111 S. Ct. at 1265.

g. Finally, petitioners argue (92-1434 Pet. 24-25; 92-1448 Pet. 11) that the court of appeals essentially sanctioned the actions of the prosecutor in this case by holding that the error was harmless. Although they can point to no prejudice they suffered as a result of the *ex parte* conference, petitioners suggest (92-1434 Pet. 24-25; 92-1448 Pet. 15) that their convictions should be reversed in order to send a message to prosecutors and district judges.

The court of appeals did not condone the prosecutor's actions in this case.[14] In any event, petitioners' argument is beside the point, because the federal courts "may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by" Fed. R. Crim. P. 52(a). *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). In *United States* v. *Hasting*, 461 U.S. 499, 506 (1983), a case involving constitutional error, this Court explained that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." Similarly, in *Bank of Nova Scotia* the Court suggested that nonprejudicial errors should be punished by remedies that "focus on the culpable individual rather than granting a windfall to the unprejudiced defendant." 487 U.S. at 263. In

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[14] The court of appeals referred to the *ex parte* conference as "highly improper" and "wholly unnecessary." Pet. App. A18-A20.

this case, the court of appeals complied with that mandate by delivering a stern lecture to the prosecutor while affirming petitioners' convictions in light of the government's showing of a lack of prejudice. Further review is not warranted.

2. Petitioner Manko contends (92-1448 Pet. 15-20) that the district court erred in declining to give his requested jury instruction that a person can act in good faith "regardless of whether that belief was reasonable." *Id.* at 17. Manko asserts (*id.* at 17) that the absence of the requested instruction allowed the jury to subject his claimed good-faith belief in the legality of his conduct to an objective reasonableness test in violation of *Cheek* v. *United States*, 498 U.S. 192 (1991). That contention is without merit.

a. A defendant is not entitled to have the jury instructed in his particular words; it is sufficient if the instructions adequately and correctly cover the substance of the requested instruction. See, *e.g.*, *United States* v. *Durades*, 929 F.2d 1160, 1167 (7th Cir. 1991); *United States* v. *Ross*, 920 F.2d 1530, 1534-1535 (10th Cir. 1990); *United States* v. *Frazin*, 780 F.2d 1461, 1468 (9th Cir.), cert. denied, 479 U.S. 844 (1986). The adequacy of the instructions must be evaluated in the context of the charge as a whole. See *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

A mistaken belief, held in good faith, that one has complied with the tax laws negates the element of willfulness and therefore constitutes a defense to certain criminal tax offenses. *Cheek* v. *United States*, 498 U.S. at 199-201. In *Cheek*, the Court held that such a belief need not be objectively reasonable in order to negate willfulness. *Id.* at 201.

In this case, the district court adequately instructed the jury concerning the element of willfulness and the good-faith defense. First, in defining willfulness, the court stated (Gov't C.A. Br. 94): "[W]ilfully means voluntarily, deliberately and intentionally, with a specific intent to do something the law forbids, that is to say, with a purpose to disobey or disregard the law. Negligent conduct is not sufficient to constitute wilfulness." That instruction correctly stated the law with respect to willfulness. *United States* v. *Pomponio*, 429 U.S. 10, 11-13 (1976) (per curiam); *Cheek* v. *United States*, 498 U.S. at 200.

The district court also instructed the jury on the good-faith defense.[15] The court stated, in part (Pet. App. E13) (emphasis added):

> The good faith of the defendant is a complete defense to the tax charges of the indictment because good faith is simply inconsistent with willfully filing a fraudulent tax return.
>
> While the term "good faith" has no precise definition, it means, among other things, an honest belief and the intent to perform all lawful obligations. *A person who acts on a belief or an opinion honestly held is not punishable under this statute merely because that honest belief turns out to be incorrect or wrong.* The tax laws subject to criminal punishment only those people who wilfully file a fraudulent tax return.
>
> A person who believes that his tax return truthfully reports the taxable income and allow-

[15] Such an instruction is not required. *United States* v. *Pomponio*, 429 U.S. at 13. In *Pomponio*, this Court held that the trial judge had "adequately instructed the jury on willfulness," and that "[a]n additional instruction on good faith was unnecessary." 429 U.S. at 13; see *Cheek* v. *United States*, 498 U.S. at 201.

> able deductions under the tax law acts in good faith and cannot be found guilty of wilfully filing a false return. Therefore, the government must prove beyond a reasonable doubt that the defendant you are considering knew that the tax law permitted only the deduction of interest paid on genuine indebtedness and that the defendant did not have a good faith belief that the transactions involved herein constituted genuine indebtedness.

That instruction told the jury that an honestly held opinion or belief, even though incorrect or wrong, was sufficient to negate willfulness. Thus, there is no merit to Manko's contention (92-1448 Pet. 15) that the district court failed to instruct the jury that it had to determine Manko's good faith "based on what [he] honestly believed."

Cheek did not require the jury to be instructed that good faith is a defense even if it is objectively unreasonable. Rather, *Cheek* held only that it was error to instruct the jury that a good-faith belief must be objectively reasonable in order to provide a valid defense. 498 U.S. at 201. No such erroneous instruction was given in this case, and the instructions that were given were plainly sufficient to convey to the jury the subjective nature of the willfulness element.

b. Manko also contends (92-1448 Pet. 17-20) that the prosecutor's summation had the effect of misleading the jury concerning the meaning of good faith, and that the district court was therefore required to "correct the false impression left by the prosecution." *Id.* at 18. In fact, however, the prosecutor did not state or imply to the jury that petitioners' beliefs had to be objectively reasonable in order to negate willfulness. The prosecutor simply invited the jury to

consider the reasonableness of petitioners' claims in deciding whether petitioners actually believed their conduct was legal. That invitation was entirely proper.

In *Cheek*, this Court expressly recognized the jury's right to consider the reasonableness of the defendant's asserted good-faith belief in determining whether the defendant actually held that belief (498 U.S. at 203-204):

> Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Similarly, in *United States* v. *Powell*, 955 F.2d 1206, 1212 (9th Cir. 1992), on which Manko relies (Pet. 16), the court specifically recognized that the jury may consider the "reasonableness" of a defendant's alleged beliefs in determining whether he actually held them. Accord *United States* v. *Barnett*, 945 F.2d 1296, 1299 (5th Cir. 1991), cert. denied, 112 S. Ct. 1487 (1992); *United States* v. *Collins*, 920 F.2d 619, 622-623 (10th Cir. 1990) (upholding instruction that "if you regard [the defendant's] belief as being highly unreasonable, you may consider this along with all other evidence on the question of whether his belief was indeed genuine or merely feigned"), cert. denied, 111 S. Ct. 2022 (1991); *United States* v. *Turano*, 802 F.2d 10, 11 (1st Cir. 1986) ("The jury * * * must use whatever evidence they can to determine what [the defendant] believed. The more unreasonable the defendant's alleged belief that he did

not have to file a tax return, the less likely he, in fact, held that belief.").

Furthermore, telling the jury that it may consider the reasonableness of a defendant's claimed belief in determining whether the belief is actually held does not in any way imply that the belief, if found to be genuine, may be disregarded if it is not objectively reasonable.[16] Thus, there was no need for Manko's proposed jury instruction that a person can act in good faith "regardless of whether his belief was reasonable." 92-1448 Pet. 8.

In short, the instructions given by the district court, taken as a whole, properly focused the jury's attention on Manko's actual (*i.e.*, subjective) state of mind. *Cheek* requires no more.

c. There is no reason to hold the petition in No. 92-1448 pending this Court's resolution of *Ratzlaf* v. *United States*, cert. granted, No. 92-1196 (Apr. 26, 1993). That case presents the question whether ignorance of the law is a defense in a prosecution under 31 U.S.C. 5324(3) for willfully structuring currency transactions in order to evade currency reporting requirements. In essence, the petitioners in *Ratzlaf* contend that the good-faith defense enunciated in *Cheek* v. *United States* should be extended to the

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[16] Indeed, the supposedly erroneous statement by the prosecutor cited by Manko (92-1448 Pet. 19) actually reinforced the subjective good-faith standard. The prosecutor stated: "But if you think what I just suggested is absolutely ridiculous, and *the defendants know that*, then it's your duty to convict them." *Ibid.* (emphasis added). Thus, the prosecutor asked the jury to consider whether petitioners knew that what they were doing was a sham, and to convict them only if they possessed such knowledge. That request was entirely consistent with this Court's decision in *Cheek*.

context of currency transactions, and the government disputes that contention. In this case, by contrast, all parties concede that *Cheek* applies, and the only question is whether the district court's instructions and the prosecutor's summation complied with the requirements of *Cheek*. Accordingly, the decision in *Ratzlaf* will shed no light on the proper disposition of this case.

3. Petitioner Manko also argues (92-1448 Pet. 20-24) that the court of appeals applied a test for determining the deductibility of interest payments that is in conflict with the test applied by several other circuits. The cases on which Manko relies (*id.* at 21-22), however, hold that interest payments are deductible only if the debt was real and interest payments were actually made. See *Rice's Toyota World, Inc.* v. *Commissioner*, 752 F.2d 89, 96 (4th Cir. 1985); *Smith* v. *Commissioner*, 937 F.2d 1089, 1098 (6th Cir. 1991); *James* v. *Commissioner*, 899 F.2d 905, 910 (10th Cir. 1990). In this case, the jury specifically found, in response to a special interrogatory, that the repo transactions were fictitious and never took place. Pet. App. A23. Thus, Manko would not have been able to take an interest deduction under any circuit's law. The issue on which Manko seeks review is therefore not presented on the facts of this case.

Manko contends (92-1448 Pet. 24), however, that the jury's response to the special interrogatory could have been the product of confusion caused by the district court's charge on the law regarding the deductibility of interest. He points to an instruction (Pet. App. E12) to the effect that the repo transactions would not support interest deductions if they "were

without economic substance, that is, that they lacked a reasonable possibility of profit apart from tax deductions, and they lacked market risk." According to Manko, "[a] finding that the transactions were 'fictitious' could have been based on the erroneous instruction that a transaction without 'economic substance' is 'fraudulent'." 92-1448 Pet. 24.

Manko's case-specific contention is not worthy of review, and in any event is without merit. The special interrogatory submitted to the jury asked it to indicate whether it had found that the transactions at issue had never taken place *or* that the transactions lacked economic substance. Pet. App. A10. Thus, the jury was informed that there was a difference between transactions that lacked economic substance and those that "were fictitious and did not take place." [17] Accordingly, the interrogatory and the jury's response unambiguously indicated that the verdict was based on the jury's finding that the transactions never took place. There is simply no reason to believe that the jury ignored its instructions and erroneously equated fictitiousness with lack of economic substance. See *United States* v. *Olano*, No. 91-1306 (Apr. 26, 1993), slip op. 15 (jurors presumed to follow instructions); *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985) (same).

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[17] Similarly, the jury instructions clearly differentiated between transactions that never occurred, on the one hand, and transactions that lacked economic substance, on the other. Pet. App. E12 (authorizing jury to convict if it found "either, one, that the transactions were a sham, that is, that they never occurred, or the alternative, two, that the transactions lacked economic substance," and defining each alternative separately).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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